No. 95-1340

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY

*Petitioner,*

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

*Respondent.*

**On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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*Amicus curiae* Lockheed Martin Corporation urges the Court to reverse the Ninth Circuit on the questions presented by the Petitioner. The written consent of the parties to the filing of this *amicus* brief has been filed with the Court.

## INTEREST OF THE AMICUS CURIAE

Lockheed Martin Corporation ("Lockheed Martin") is a highly diversified advanced technology corporation comprised of eighty-five operating companies and approximately 190,000 employees. Its core businesses are in aeronautics; command, control, communications, intelligence and systems integration; electronics; energy and environment; information and services; and, space and strategic missiles. Lockheed Martin is the largest

contractor for the Departments of Defense and Energy, and NASA. Its government contracts are subject to extensive legal and regulatory requirements and, frequently, government agencies audit and investigate whether the corporation's operations are being conducted in accordance with these requirements.

Lockheed Martin has been directly affected by the False Claims Act ("FCA") Amendments of 1986 ("1986 amendments"), Pub. L. No. 99-562, 100 Stat. 3153, 31 U.S.C. §§ 3729, *et seq.*, which have stimulated a substantial increase in the number of *qui tam* actions brought by individuals (or "relators"), on behalf of the government against government contractors.1/ Lockheed Martin, through Lockheed Missiles and Space Company, Inc., is currently the defendant in a *qui tam* action entitled *United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.*, No. C 88-20009 JW (N.D. Cal.) (hereafter

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1/ While the FCA allows the government to intervene in the action (31 U.S.C. § 3730(b)(4) (1986)), in the vast majority of cases the government has declined to intervene. *See* Department of Justice *Qui Tam* Statistics, printed in 64 Fed. Contracts Rpt. 348-49, 362 (BNA Oct. 23, 1995) (hereafter "Statistics") (From FY 1987 through FY 1995, 1,105 *qui tam* actions were filed. The government intervened in only 189 cases, and declined 672 cases; the remainder, presumably, were still under seal.) Historically, when the government declines to intervene, the relator's action has been subject to certain limitations. Prior to the 1986 amendments, the relator's action was barred if it was based on information already known to the government. 31 U.S.C. § 3730(b)(4) (1982). Under the amended provision, government knowledge, by itself, no longer bars a *qui tam* action. Rather, the action is barred if it is based upon the "public disclosure" of allegations or transactions in a criminal or civil action, administrative hearing, report, audit or investigation, or in the news media, unless the relator is an "original source" of the information, in which case that relator is authorized to pursue the action. 31 U.S.C. § 3730(e)(4) (1986).



"*Newsham*"). That action turns on two of the questions presented in Hughes' petition concerning the right to maintain a *qui tam* action: (a) whether applying the "public disclosure" provision of the 1986 amendments to pre-amendment conduct is an impermissible retroactive application of that provision, and (b) how to define a "public disclosure."2/

On both issues, Hughes asserted below a view shared by Lockheed Martin. First, to allow a *qui tam* action based on information the government possessed prior to the 1986 amendments would be an improper retroactive application of the "public disclosure" provision because it would increase a contractor's liability by requiring it to defend an action that was barred under the pre-1986 FCA. Second, to allow a *qui tam* action based on a government audit that was publicly disclosed through its wide distribution within

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2/ In *Newsham*, the relators allege false charging of labor hours on government contracts. One of the relators disclosed virtually all of the allegations to the government in 1984, well before the 1986 amendments were enacted. In addition, prior to 1986, the government's Defense Contract Audit Agency audited those allegations. The audit reports were distributed to Lockheed and reviewed by the government's contracting officers, who determined that no claim against Lockheed was appropriate. *See* Memorandum of the United States As Amicus Curiae, *United States ex rel. Newsham v. Lockheed Missiles and Space Co. Inc.*, No. C 88-20009 JW (reprinted in Appendix ("App.") (1a-17a) at 4a-5a). The *qui tam* action, filed in 1988, is based on the same allegations that the government had investigated prior to 1986. After investigating the allegations for the second time, the government declined to intervene. The court denied Lockheed's motion to dismiss under the pre-1986 "government knowledge" provision, holding that the amended "public disclosure" provision applies to the case even though the alleged misconduct arose prior to the 1986 amendments and had previously been investigated by the government. *Newsham*, 907 F. Supp. 1349, 1358 (N.D. Cal. 1995).

a company is inconsistent with the FCA, as amended, and could result in a *qui tam* action by a company employee whenever an audit contained adverse findings.

The Ninth Circuit rejected both arguments. Therefore, this Court's decision will have a significant effect on current and possibly future litigation against Lockheed Martin and other contractors.

## SUMMARY OF ARGUMENTS

**1. The 1986 FCA amendment repealing the "government knowledge" bar cannot be applied retroactively.** The pre-1986 FCA provided a bright line defense to *qui tam* actions based on information the government possessed when the action was filed. 31 U.S.C. § 3730(b)(4) (1982). Under that rule, contractors were secure in knowing that the government's knowledge of relevant information freed them from the threat of *qui tam* actions. Applying the "public disclosure" provision, enacted in 1986, to pre-1986 conduct removes that security and exposes contractors to expensive litigation and the risk of substantial liability. Accordingly, under *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), the public disclosure provision cannot be applied retroactively because it would "increase a party's liability for past conduct" and "impose new duties with respect to transactions already completed." 114 S. Ct. at 1505.

**2. The allegations, which were the subject of a government audit and investigation, were "publicly disclosed" in accordance with the plain meaning of that term and Congress' intent.** The government, having received information from one of Hughes' customers (Northrop Corporation) about allegations of wrongdoing at Hughes (Joint Appendix ("J.A.") at 20), commenced an audit and investigation. Its investigative findings and audit reports were disclosed throughout Hughes and to Northrop prior to Schumer filing his *qui tam* action which raised the same allegations as those in the audit reports. J.A. at 37, 42, 45-47, 55, 64, 66. Under the amended FCA, a *qui tam*



action is subject to being barred if it is "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . audit or investigation." 31 U.S.C. § 3730(e)(4)(A). The disclosures in question are "public disclosures" within the meaning of section 3730(e)(4)(A).

## I. THE REPEAL OF THE "GOVERNMENT KNOWLEDGE" BAR CANNOT BE APPLIED TO PRE-AMENDMENT CONDUCT.

In *Schumer* and in *Newsham*, the government became aware of the alleged wrongdoing prior to the enactment of the 1986 FCA amendments. By virtue of that knowledge, any *qui tam* lawsuit based on those allegations was barred outright under the pre-1986 FCA. The companies were secure in knowing that *qui tam* enforcement -- a statutory scheme distinct from the investigatory and enforcement mechanisms available to the government -- was absolutely precluded. In both cases, the government undertook enforcement efforts with the full cooperation of the companies and eventually determined that neither an FCA action nor an administrative contract action was appropriate.

The 1986 amendments repealed the government knowledge bar to *qui tam* actions. If that act of repeal is held to apply retrospectively to Schumer's and to Newsham's complaints -- each filed after 1986 -- the effect would be to breathe new life into two lawsuits that should have been absolutely precluded. The Ninth Circuit applied the 1986 amendment to the *Schumer* action, finding that it "'did not alter [the contractor's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability.'" *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") (1a-31a), at 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)).

The effect of that decision is profoundly unfair to Hughes (as well as to Lockheed Martin which, but for retrospective application, would have avoided what has become a complex, costly, and lengthy (eight-year) burden of defending a lawsuit the government deemed to be without merit). This Court has held that such an effect cannot be imposed unless "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 114 S. Ct. at 1501.

### A. Regardless Of Whether The Amendment Is "Jurisdictional," It May Not Be Applied To Cases Based On Information The Government Possessed Prior To October 27, 1986 Because That Provision Affects Rights And Obligations Of The Parties.

This Court's decision in *Landgraf* reaffirmed that a statute is presumed to operate only prospectively absent clear congressional intent to the contrary. *Landgraf*, 114 S. Ct. at 1501 (holding that "prospectivity remains the appropriate default rule"). Because Congress did not state whether § 3730(e)(4), or any of the other 1986 FCA amendments, should be applied to cases based on information the government possessed prior to October 27, 1986, the repeal of the government knowledge bar is presumed to operate only prospectively.

Nevertheless, the Ninth Circuit found that there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. at 6a. That finding is not supported by this Court's decisions which are bereft of any language that excuses a jurisdictional provision from the traditional default rule. In *Landgraf*, the Court noted that a jurisdictional provision "*usually* 'takes away no substantive right but *changes* the tribunal that is to hear the case'" and that "[p]resent law *normally* governs in such situations because jurisdictional statutes '*speak to the power of the court rather than to the rights or obligations of the parties.*'" 114 S. Ct. at 1502 (emphasis added; citations omitted). The jurisdictional statutes at issue in the cases cited in *Landgraf* fit that paradigm: they affected the power of the court without extinguishing the rights of the parties.[3/]



The repeal of the government knowledge bar, on the other hand, affects the rights and obligations of the parties. It gives relators a right to sue under circumstances in which they previously could not sue and deprives contractors of a previously available defense. Consequently, even if the provision at issue is "jurisdictional," it cannot be applied retroactively.

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3/ *See Bruner v. United States*, 343 U.S. 112, 116-117 (1952) (jurisdictional statute did not alter the validity of the rights and liabilities at issue, but *reduced the number* of tribunals authorized to determine such rights and liabilities); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (new jurisdictional statute applied because it "takes away no substantive right but simply *changes* the tribunal that is to hear a case") (emphasis added); *The Assessor v. Osborne*, 76 U.S. (9 Wall) 567, 575 (1870) (dismissing case because diversity jurisdiction was not alleged, and under new statute only state courts had jurisdiction over the claim); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-08 (1978) (in an agency review case, elimination of the $10,000 amount-in-controversy requirement saved complaint that failed to make such allegation); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) (granting right of appeal of decisions by the United States court in the Indian Territory; by its terms, statute was to be applied retrospectively); and *United States v. Alabama*, 362 U.S. 602 (1960) (statute conferring jurisdiction over new class of defendants applied, but suit was for injunctive (*i.e.*, prospective) relief), *reh'g denied*, 363 U.S. 857. Similarly, the jurisdictional cases cited in Justice Scalia's concurrence, *Landgraf*, 114 S. Ct. 1523, 1525, involved statutes that merely modified the number of tribunals that could hear a case and/or were expressly retroactive.

### B. The Repeal Of The "Government Knowledge" Bar Changes The Legal Consequences of Past Events.

Under *Landgraf*, a statute may not be applied retroactively if it "attaches new legal consequences to *events* completed before its enactment." 114 S. Ct. at 1499 (emphasis added). Thus, the Court must consider the consequences of pre-amendment events for the government and relators as well as for the defendant.[4/] Because under the pre-1986 FCA the government's acquisition of information about alleged false claims barred Schumer's action, the 1986 amendment, if retroactively applied, would change the legal consequences of events that occurred before its enactment.

The result is the same whether: (a) the government acquired the information upon which the action was based *and* the relator filed the complaint *before* the 1986 amendments were enacted (as in *United States ex rel. Hyatt v. Northrop Corp.*, CV-86-6437-KN (C.D. Cal.) and *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987)); or (b) the government acquired the information before the 1986 amendments were enacted, but the relator filed the complaint *after* they were enacted (as in *Newsham* and *Schumer*). In either situation, the amendment changes the consequences of pre-amendment events. Accordingly, the amended FCA's public disclosure provision which repealed

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4/ *Cf. United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (finding that "the proper focus of retroactivity analysis is the conduct that would be affected by the law" and stating, in *dicta*, that the amendment to the government knowledge bar in the FCA could not be applied retrospectively in a case where the relator disclosed the information to the government prior to 1986), *cert. denied*, 116 S. Ct. 700 (1996).



the government knowledge bar cannot be applied to actions based on information the government possessed prior to its enactment.

The application of the public disclosure provision to facts such as those presented in *Schumer* would, like retroactive application of an expanded statute of limitations, revive a previously barred claim. Yet, this Court has refused to apply a new statute of limitations where it would bar an otherwise viable claim or revive a previously barred claim. *See, e.g., United States v. St. Louis, S.F. & T.R.. Co.*, 270 U.S. 1, 3 (1926) (refusing to apply a three-year statute of limitations retroactively to bar a claim because such construction is not required by the explicit language of the statute or by necessary implication);[5/] *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry. Co.*, 266 U.S. 435, 437 (1925) (holding that a new law that would toll the statute of limitations could not be applied so as to revive stale claims). Hence, this rationale leads to the obvious conclusion that the public disclosure provision cannot be applied retroactively.

### C. The Repeal Of The "Government Knowledge" Bar Increases Contractors' Liability And Imposes Additional Duties.

The Ninth Circuit found that, because the public disclosure provision "'did not alter [the contractor's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability'" it could be applied retroactively to Schumer's action. Pet. App. at 7a (quoting *Lindenthal*, 61 F.3d at 1408). However, this Court's rule against the retroactive

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5/ *St. Louis* was cited in *Landgraf* for the proposition that a statute should not be applied retroactively absent explicit language or a clear purpose requiring such application, indicating the continued vitality of the case. *Landgraf*, 114 S. Ct. at 1501 n.27.

application of new laws is not limited to statutes that alter the legality of prior conduct. In fact, in *Landgraf*, this Court refused to apply a new compensatory damages provision retroactively even though "it [did] not make unlawful conduct that was lawful when it occurred." 114 S. Ct. at 1506. The Court noted that the damages provision would impose "a 'new disability' in respect to past events." *Id.* at 1506-07 (citation omitted). Similarly, the public disclosure provision would, if applied to conduct occurring before its enactment, impose additional duties on contractors.

A statute that confers rights on a new class of plaintiffs cannot be applied retroactively because it imposes new obligations on defendants. *See Winfree v. Northern Pacific Railway Co.*, 227 U.S. 296 (1913) (cited with approval in *Landgraf*, 114 S. Ct. at 1507). In that case, an accident resulting in the death of a minor occurred at a time when the law allowed a wrongful death action only by the father and only in state court. Congress subsequently passed a law which enabled the administrator of the estate to bring a wrongful death cause of action in federal court. Had the statute merely permitted the father to move from state to federal court, it would have been indistinguishable from jurisdictional statutes that determine the appropriate tribunal for an action, and therefore, retroactive application might have been appropriate. However, extending the cause of action to a new class of plaintiffs (the administrator of the estate), "permitted recovery in cases where recovery could not be had before and [took] away the defendant's defenses which formerly were available." 227 U.S. at 302. Because there existed no cause of action for the administrator at the time the accident occurred, this Court held that the statute could not be applied retroactively to give the administrator a right of action. *Id.*

The concerns expressed by the *Winfree* Court are more significant in cases brought pursuant to the FCA, given the reality that many contractors would not have been sued if the relators' action had been barred under the pre-1986 FCA. For example, in *Newsham*, the government, through



its contracting officers, determined that no claim against the contractor was appropriate. *See* App. at 4a-5a.[6/] Thus, permitting relators to bring actions that could not have been brought under the pre-1986 FCA increases contractors' liability by forcing them to defend these actions.

This is especially troublesome because *qui tam* actions declined by the government but pursued by relators are nearly always without merit.[7/] Thus, the contractor's liability is increased for benign acts. The scenario of a *qui tam* relator purporting to "stand in the government's shoes" while asserting a position completely at odds with the government's own position is, regrettably, not uncommon. *See, e.g., Lindenthal*, 61 F.3d at 1411-12 (relator's contention about the quality of engineering drawings which defendant sold to the Air Force was undercut by the government's testimony that the drawings were compliant with the contract and did not give rise to any false claims); *United States ex rel. Haycock v. Hughes Aircraft Company*, Nos. 94-55620, 94-55826, 1996 U.S. App. LEXIS 27664 (9th Cir. Oct. 21, 1996) (Unpublished decision, reprinted at App. 18a-21a) (affirming summary judgment in a *qui tam* action that was based on accounting practices that were known to and approved by the government).

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6/ Like the amended FCA which assigned the government's rights to relators, the statute in *Winfree* modified who may bring an action by assigning claims to the administrator of the estate. An "assignment" is particularly anomalous in *Newsham* where the primary holder of the right to sue for any alleged false claims, the government, determined that there was no basis on which to bring such an action.

7/ From FY 1987 through FY 1995, recoveries had occurred in only 31 of the 672 cases in which the government declined intervention; the $15.6 million recovered in these 31 cases is less than 1% of the government's total recoveries under the FCA. Statistics, *supra*, n.1.

The government knowledge bar in the pre-1986 FCA provided an automatic bar to cases like *Lindenthal, Newsham, Schumer, Boisvert and Hyatt* that are based on information that the government possessed before the case was filed. Under the 1986 amendments, in the absence of a public disclosure, those kinds of cases cannot be disposed of until the summary judgment stage or after trial.[8/] Consequently, application of the public disclosure provision to pre-enactment conduct imposes substantial costs and other burdens on contractors.

Furthermore, the realities of *qui tam* litigation show that permitting a relator to sue in place of the government is, itself, a new liability. Actions by relators impose several duties, obligations and increased costs on contractors.

First, because a relator has only a single option for attempting to resolve the matter -- litigation under the FCA -- he forecloses the contractor's opportunity to resolve the matter through other means available to the government. The government has a variety of enforcement mechanisms. For example, it may bring a contract action (*see* 41 U.S.C. §§ 601-613), make cost disallowances (48 C.F.R. 52.242-1), withhold payment (48 C.F.R. 32.611-2), suspend the contractor (48 C.F.R. 9.407), or bring an FCA action. In a matter pursued by the government, the contractor faces an "opponent" with discretion and flexibility to resolve the matter in a more fair, appropriate and expeditious manner.

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8/ This fact is highlighted by the Ninth Circuit's decision in *Lindenthal*. Although the government knew of the information forming the basis of the relators' claim prior to 1986, the district court and the Ninth Circuit applied the amended provision to those claims and allowed the action to proceed. *Lindenthal*, 61 F.3d at 1407-1408. It was not until after the expenditure of a great deal of time and money on discovery, a lengthy bench trial, and an appeal that General Dynamics prevailed on the merits. *See id.* at 1405-1406, 1410-1412.



Second, a relator's quest for a bounty of up to 30% of the government's recovery (§ 3730(d)(1)) gives rise to a conflict of interest between appropriate enforcement of the law and maximizing personal gain. In the course of settlement discussions, the relator's bounty demands can result in delay in the ultimate resolution of the case because of disputes he may have with the government over the division of proceeds.[9/] The relator's bounty demands may also effectively compel the contractor to pay a higher amount to settle the case than would have been demanded by the government if the government had brought the case alone. Alternatively, the contractor may be compelled to undertake the expense and risk of litigating a *qui tam* case that may otherwise have been settled by the government.

Third, relators increase a contractor's potential liability because contractors may be held liable (under § 3730(d)) for relator's attorneys' fees, but not the government's.[10/]

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9/ A relator's bounty demand may be an effort to obtain more than a fair share of the government's proceeds, thereby delaying the ultimate resolution of the matter. *See, e.g., United States ex rel. Killingsworth v. Northrop*, 25 F.3d 715 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 296 (1996) (the government, upon assertion that the relator had unfairly allocated settlement proceeds to his personal claim and away from the government, was entitled to a hearing to challenge the settlement).

10/ Lockheed Martin submits that the attorneys' fees provision, which did not exist prior to the 1986 amendments, cannot be applied retroactively. Unlike the situation in *Bradley v. School Board City of Richmond*, 416 U.S. 696 (1974), attorneys' fees were not available in FCA actions prior to the enactment of the 1986 amendments. Nevertheless, at least one court has ruled that the attorneys' fee provision applies to a case based on pre-amendment conduct where the fees were incurred after its enactment. *See Newsham*, 907 F. Supp. at 1360-1361.

Fourth, relators make it more difficult to obtain discovery. Contractors cannot obtain written discovery from the government when it declines to intervene because, even though the government may be the real party in interest, it is not a party to the action. Contractors must resort to the more limited discovery procedures available against non-parties when they seek what is often the most crucial discovery in the case -- information from the government showing the validity of the questioned conduct.

In sum, *qui tam* actions pose financial and other burdens and risks which are distinct from those faced when the government pursues enforcement efforts on its own. The Ninth Circuit was wrong in concluding that the public disclosure provision could be applied to Schumer's action. *See* Pet. App. at 7a. For the reasons stated above, the repeal of the government knowledge bar "attaches new legal consequences to events completed before its enactment," *Landgraf*, 114 S. Ct. at 1499, "impose[s] new duties with respect to transactions already completed," and "increase[s] a [contractor]'s liability for past conduct." *Id.* at 1505. Consequently, the public disclosure provision cannot be applied retroactively.

## II. THE NINTH CIRCUIT'S DEFINITION OF "PUBLIC DISCLOSURE" IS INCONSISTENT WITH THE LANGUAGE OF THE AMENDED FCA AND WITH CONGRESS' INTENT TO BAR PARASITIC ACTIONS.

Even assuming that the public disclosure provision applies retroactively, Schumer's action is barred. Construed in accordance with its plain language, the provision barring a *qui tam* action that is "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . audit or investigation," bars this case where the government conducted an audit and investigation and disclosed the matter to members of the public who were unaware of the alleged wrongdoing. To the extent that the ordinary meaning of these terms cannot be derived within the statutory context, the Court may rely on congressional intent as reflected in the FCA's legislative history.



The Ninth Circuit held that the government's disclosures to Hughes and Northrop -- even to individuals not engaged in or aware of the alleged wrongdoing -- should not be considered "public" disclosures. The court, believing without foundation that defense contractors and the government "operate within a closed loop of secrecy" and in a "private sphere," exempted defense contractor employees from being considered members of the public. Pet. App. at 9a. This exemption is neither expressed nor implied in the statute. Further, it conflicts with the legislative purpose of barring *qui tam* actions that duplicate and interfere with actual enforcement efforts already undertaken by the government.

### A. The 1986 Amendment Preserved The Bar Against Parasitic *Qui Tam* Actions While Maintaining The Government's Exclusive Right Of Enforcement In Certain Circumstances.

The pre-1986 government knowledge bar afforded the government complete deference to determine: (a) how to act upon information in its possession, including whether to proceed in a criminal, civil or administrative forum; (b) when to act, or (c) whether to act at all. Unless the relator filed his *qui tam* action prior to the government learning of the alleged wrongdoing, his action was barred.

The 1986 amendment reduced to some extent the deference afforded the government concerning FCA enforcement and expanded the opportunities for *qui tam* enforcement. Congress attempted "to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

Congress believed that, too often, the government failed to take *any* action on information in its possession.

> [T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action.

H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

> We must prevent suits from being dismissed simply by the Government's assertion that the Government already had the information brought forward by the plaintiff in order to ensure that the Government is indeed acting on that information.11/

Weighing these concerns, Congress repealed the government knowledge bar and replaced it with a rule that bars *qui tam* actions "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the

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11/ *False Claims Act Amendments, 1986: Hearings Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 95, (1986) (statement of Rep. Berman). *See also* 132 Cong. Rec. H6483 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell) ("there may be many cases where evidence is somewhere in the hands of some Government official, even if the Government does not have the evidence in organized form or even knows it has the information"). Congress also believed that inaction often was due to the government's "judgment that devoting scarce resources to a questionable case may not be efficient." S. Rep. No. 345, 99th Cong., 2d Sess. 7, reprinted in 1986 U.S.C.C.A.N. 5266, 5272 (hereafter "Senate Report"). This concern has proved to be unfounded, as less than 1% of the money recovered under the FCA since 1986 has come from cases declined by the government and prosecuted by *qui tam* relators. Statistics, *supra*, at n.1.



action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).

The amended provision preserves, in certain circumstances, the government's exclusive enforcement authority and unfettered right to decide how or whether to enforce the law. The question presented by the amended provision is: What event must occur in order for the government to maintain its exclusive right of enforcement? Because neither the statute nor the legislative history defines the term "public disclosure," there has emerged a range of interpretations:

- Two circuits have held that a public disclosure occurs whenever the government undertakes one of the enumerated enforcement efforts in a manner that is visible (or "disclosed") to someone outside the government who had no prior knowledge of the matter.12/

- Another circuit, which recognized the difficulty of determining whether information was actually disseminated, held that a public disclosure occurs when the information is "available" or "potentially accessible" to a member of the public with no previous knowledge.13/

- The statute can be reasonably interpreted as barring *qui tam* enforcement whenever information about wrongdoing is disclosed outside the private group of alleged wrongdoers (*i.e.*, "publicly") *to* the government during the course of a government audit or investigation. In that regard, the "public" disclosure is the disclosure of

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12/ *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (disclosure of subject matter of investigation); *United States ex rel. Fine v. MK-Ferguson Co.*, Nos. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996) (disclosure of audit report).

13/ *United States ex rel Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1157-60 (3d Cir. 1991).

information beyond the confines of the wrongdoer *to* the government rather than *by* the government. The bar would be applied, however, only when the government acted on that information by commencing an audit, investigation or one of the other enumerated enforcement mechanisms.

The decision below is inconsistent with other rulings, with the statutory language and with Congress' intent.

**B. A "Public Disclosure" Occurs When The Government Discloses Its Audit Report To Anyone Outside The Government, Including Employees Of The Audited Contractor Who Were Unaware Of The Alleged Wrongdoing.**

**1. The Ninth Circuit's Exemption Of Defense Contractor Employees From Being Considered Members Of The Public Is Unfounded.**

The Ninth Circuit held below that the government's disclosure of its audit report to employees of the audited contractor who were not involved in the alleged fraud (termed "innocent employees"), did not qualify as a public disclosure. Pet. App. at 8a-11a (disagreeing with the Second Circuit's holding in *Doe*, 960 F.2d at 323).14/ The

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14/ In *Doe*, the Second Circuit held that public disclosure occurs when the government, in the course of an investigation, discloses the subject matter to members of the public with no prior knowledge thereof -- in that case, employees of the targeted company who did not participate in the alleged fraud but whom the government interviewed in connection with its investigation. 960 F.2d at 319-20. In *United States ex rel. Fine v. MK-Ferguson Co.*, Nos. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996), the U.S. Department of Energy's disclosure to the government of Oregon of a federal audit containing allegations about a contractor located in Oregon was held to be a public disclosure even though the state did not further disseminate the audit.



court believed it was unrealistic to consider these individuals to be members of the public. Pet. App. at 9a. This belief was premised upon a set of erroneous assumptions about the motivations of defense contractor employees and their relationship with the government's oversight personnel. The record contained not one iota of evidence to support these sweeping conclusions.

The first faulty assumption was that employees of defense contractors are uniquely inclined to suppress fraud.

> Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure.

*Id.* The court further commented:

> [I]n the context of defense procurement, security considerations generally require that the government, contractors and subcontractors operate within a closed loop of secrecy.

*Id.* Thus, the court held that the government's release of information to a defense contractor is a disclosure "within a private sphere." *Id.* at 9a-10a.

The FCA does not expressly or impliedly exempt defense contractor employees (or any other kinds of employees) from status as members of the public; nor does it identify certain forms of disclosure as "private."15/

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15/ One could infer from the ruling that a disclosure of a government audit to a business not engaged in defense contracting would constitute a public disclosure. It is improper to single out "defense" contractors for greater exposure to *qui tam* actions. "[C]ourts are not at liberty to create an exception where Congress has declined to do so." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

Congress expressly identified a government audit as one vehicle for the occurrence of a public disclosure. § 3730(e)(4)(A). Congress must have been aware of the fact that such audits are routinely disclosed by the government to the audited contractor (and to the prime contractor when the audited company is a subcontractor).

The Defense Contract Audit Agency ("DCAA"), which conducted several of the audits that preceded the filing of Schumer's *qui tam* action (as well as the audits which preceded the *Newsham* action against Lockheed Martin), "routinely provides copies of draft reports for all audits . . . to the contractor being audited for review and comment." DCAA Audit Manual § 10-212.2 (1996).16/ Apart from such disclosures, the government does not publish its audit reports, mail them to reporters or other industry observers, place them in the Congressional Record, or file them in libraries or courthouses. Accordingly, the Ninth Circuit strains the meaning of the statute by creating an exception to the term "public disclosure" which, in turn, exempts the most common way that government audits are disclosed outside the government, *i.e.*, by sending such audit reports to the subject company.

Furthermore, the court's assumptions about contractor employees and government oversight personnel being part of a "closed loop of secrecy" are unfounded. There is nothing peculiar about government contracting that fosters keeping illegal conduct secret. The Ninth Circuit's treatment of contractor employees disregards the key role that Congress carved out for those individuals in its enforcement scheme. Congress believed that in situations

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16/ While the Audit Manual in effect in 1986 does not state that such disclosures are "routine," it notes that disclosure is subject to the contracting officer's approval. § 10-213.3 (1983). In both *Schumer* and *Newsham*, DCAA disclosed its audit reports to the contractors.



in which allegations of wrongdoing by a company remained undisclosed and unaddressed by the government, an employee of that company with knowledge of the wrongdoing would step forward to enforce the law.17/

Had Congress shared the court's distrust of contractor employees, it would have enacted a vastly different statute. *Doe*'s holding that *qui tam* enforcement is barred when the wrongdoing is disclosed by the government to "innocent employees" who were "strangers to the fraud" implements the core rationale of the *qui tam* provisions and the bar against parasitic actions. The Ninth Circuit, by adopting a rule not contained within the text of the statute, ultimately second-guesses and overrides Congress' rationale.

### 2. The Ninth Circuit Misinterpreted The Purpose Of The 1986 Amendment.

The Ninth Circuit overlooked the legislative history described above which shows that Congress repealed the government knowledge bar in 1986 because it was concerned about the government possessing information but taking no action, *i.e.*, conducting no investigation and taking no enforcement steps whatsoever. Had the court correctly assessed Congress' intent, it would have found that the government's actions in this case justified barring the *qui tam* action.

The Ninth Circuit stated that *Doe*'s holding:

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17/ *See* Senate Report at 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity"). Thus, Congress presumed that most *qui tam* actions would be filed by contractors' employees as, in fact, they have been. *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*) (noting that employee cases are the "paradigm *qui tam* case").

> drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter. . . . Contrary to Congress' intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits.

Pet. App. at 10a (citing the dissent in *Doe*, 960 F.2d at 326).

The pre-1986 FCA barred *qui tam* enforcement on the basis of "government knowledge." Thus, the Ninth Circuit overlooked the fact that, under the pre-1986 law, *qui tam* actions were barred well before the government commenced an "investigation," or otherwise became "involved in the matter." There is a vast difference between: (a) government knowledge with no investigation, and (b) government knowledge coupled with an investigation. The legislative history suggests that Congress intended to move the bar from (a) to (b). The congressional statements quoted above strongly suggest that if the pre-1986 FCA had ensured that the government actually conduct an investigation or an audit before a *qui tam* action could be barred, Congress would have been satisfied with such government efforts and would not have expanded *qui tam* enforcement.

Thus, the Ninth Circuit's statement that the *Doe* case bars *qui tam* enforcement upon the government's commencement and disclosure of its investigation is correct. However, the Ninth Circuit is wrong to equate such enforcement with what Congress perceived in 1986 to be complete inaction.

The enforcement efforts undertaken here by the government are far from inaction, and the disclosures



between the government and the contractors did not occur within a "closed loop of secrecy."18/ Indeed, the events described in the record portray the government's efforts as a model of efficient dispute resolution. The disclosures of information between the interested parties during the course of the investigation and resulting from the government's withholding of payment, enabled Hughes to demonstrate to the government and to Northrop that the cost charging practices in question not only were proper but actually saved the government money. J.A. at 136. This process enabled the government to avoid costly and time-consuming litigation.

Unfortunately, however, much of the efficiency gained by such resolution was lost to Hughes. Notwithstanding the government's favorable determination, Hughes still had to litigate the same matter against an individual who, purporting to stand in the government's shoes, asserted that the government had been defrauded. Because, in *Schumer*, the government exercised enforcement and disclosed its actions outside the government, *qui tam* enforcement is barred.

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18/ The record reflects that, upon the request of Northrop (J.A. at 20), a lengthy investigation and audit process was undertaken, involving scores of people from Hughes, Northrop and the government, each of whom disclosed and received information about the allegations and transactions. Government personnel who participated in this dialogue and disclosure of information (and who routinely participate in such matters) included those responsible for awarding and supervising the contracts, administering and monitoring the costs charged on the contracts, auditing and investigating the contractor's business practices, and determining what enforcement actions were appropriate. The latter category of government personnel included the Administrative Contracting Officer, who initially withheld payment of costs (J.A. at 45-47), and the Defense Procurement Fraud Unit of the Department of Justice, which had prosecutorial discretion (J.A. at 31).

### C. A "Public Disclosure" Occurs When Allegations Disclosed To The Government Result In A Government Audit Or Investigation.

The Ninth Circuit's fear that disclosure of government audits to company employees would "not trigger the potential for corrective action presented by other forms of disclosure" (Pet. App. at 9a) is misplaced. Section 3730(e)(4) and its history suggest that the government's actual audit or investigation of allegations disclosed to the government is sufficient corrective action to bar *qui tam* enforcement. Under the statutory scheme, the Court can properly apply a *per se* rule that whenever allegations are disclosed to the government, and, as a result, the government commences an audit or investigation of allegations, no one other than the "original source" of the allegations may bring a *qui tam* action.

Such a *per se* rule can be derived from the decisions of courts which have held that a public disclosure occurs when information is "available" or "potentially accessible" to the public even if no one has actually sought to obtain the document. *See, e.g., United States ex rel. Kreindler et al. v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993) (information obtained by an attorney from an opposing party during discovery in a prior non-related civil action "was publicly disclosed because it was available to anyone who wished to consult the court file"); *United States ex rel. Stinson v. Prudential*, 944 F.2d at 1157-60 (same result on similar facts even though the information obtained in discovery was not filed in the courthouse). A government audit or investigation certainly triggers a greater potential for enforcement than a disclosure in a non-governmental civil "hearing" (properly defined as any civil proceeding) -- which is another form of disclosure enumerated in § 3730(e)(4)(A).



Government audit reports are routinely available to members of the public through the Freedom of Information Act ("FOIA").[19] Therefore, if a public disclosure occurs when information is potentially accessible, then an audit can be deemed a public disclosure once it has been prepared by the government.[20] This *per se* rule is consistent with Congress' desire to limit *qui tam* actions when the government has already undertaken actual enforcement.

A *per se* rule barring *qui tam* actions based on government audits can also be derived from an examination of the text of the provision. Section 3730(e)(4) does not expressly require *the government's* disclosure of its audit report outside the government. Rather, the "public disclosure of allegations or transactions in a[n] . . . audit" can be read entirely consistently with the statute to apply to allegations that are disclosed outside the "private" group of wrongdoers when such disclosure leads to a government audit or investigation. "Public," as commonly used, is contrasted with the "private" group of wrongdoers. *See* Webster's Ninth New Collegiate Dictionary 952 (Merriam-Webster 1991) ("public" defined as "of or relating to business or community interests as opposed to private affairs"). "Disclosure" is defined in Black's Law Dictionary

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19/ 5 U.S.C. § 552. The DCAA's FOIA regulations state an intent to "[p]romote public trust by making the maximum amount of information available to the public, upon request, pertaining to the operation and activities of the Agency." 32 C.F.R. § 290.4.

20/ The court below held that an audit report is publicly disclosed under FOIA only when it is actually requested and released. Pet. App. at 13a. The presumption that DCAA audit reports are accessible to the public held true in this case; Schumer successfully obtained each of the audits by submitting a FOIA request, though not until after he filed his *qui tam* action. *Id.*

464 (6th ed. 1990) as "[t]o bring into view by uncovering; to expose; to make known . . . to free from secrecy or ignorance . . . ." Thus, when information is disclosed outside the private group of wrongdoers, there has been a public disclosure. When that public disclosure leads to a government audit or investigation, the desired enforcement mechanisms of the FCA are triggered.

"A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' not their mimics." *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). The disclosure of information to the government about wrongdoing is what sounds the alarm. Such disclosures occur when employees call the Department of Defense's "hotline" and through DoD's Voluntary Disclosure Program which encourages contractors, through a possible reduction in sanctions, to disclose their wrongdoing to the government. Once a voluntary disclosure is initiated, the government commences an investigation and decides on appropriate enforcement measures, including, specifically, whether to bring a civil FCA action.21/ As currently interpreted by most circuits, § 3730(e)(4)(A) would permit a *qui tam* action by an employee whose information was obtained solely from the company's voluntary disclosure -- a result which severely impedes the goals of this program.

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21/ *See Department of Defense Voluntary Disclosure Program, A Description of the Process*, (DoD Inspector General April 1990) (reprinted in App. at 20a-43a), App. at 29a (describing the purpose of the program), App. at 40a ("Following receipt of the contractor's internal report, the designated [investigative organization(s)] begins the verification process. The verification audit and investigation are given sufficiently high priority to allow for its expedited completion").



This absurd result would not occur if the above statutory construction were applied.22/ Under this construction, as soon as the government responds to such a disclosure by commencing an audit or investigation, the FCA bars a *qui tam* action by anyone other than the "original source" of the disclosure. If, on the other hand, the government fails to take any responsive action, and none of the other forms of public disclosure occur, then anyone may bring a *qui tam* action.

The government, in at least one case, has asserted a similar view:

> The section-by-section analysis [of the legislative history] does not distinguish between information in the possession of the government that has been released to the public at large, and government information that has been obtained in another manner. The information upon which this case was based was not only *developed by* the government, but also the government had an open investigation of the facts alleged in the complaint at the time the suit was brought. Under the statutory language and the section-by-section analysis, this action is barred because it is based solely upon information *developed by* and available to the government.23/

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22/ *See* Ryland, *The Government Contractor's Dilemma: Voluntary Disclosure as the Source of Qui Tam Litigation*, 22 Pub.Cont.L.J. 764, 800-802 (1993) (the Voluntary Disclosure Program "clearly should qualify as an "administrative investigation;" "information submitted by the contractor has actually been disclosed to 'strangers to the fraud'").

23/ Brief for the United States, *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (emphasis added), attached to Hughes' Supplemental Brief On Petition for Writ (filed Sept. 25, 1996), App. B, at 24a.

Information "developed by" the government is essentially the same as information "disclosed to" the government. Thus, the government asserted the position that a *qui tam* relator who merely mimics what has already been disclosed to and investigated by the government adds nothing to the enforcement scheme and should be barred from maintaining a *qui tam* action.

There is no basis for applying the bar only when the government discloses the allegations outside the government. This misplaced focus stems, in part, from cases in which the government argued that a government employee could not be a relator because his suit was based upon allegations which he disclosed outside the government to himself as a member of the public.[24/] Also, while *Doe* considered how far the allegations contained in the government's investigation must seep into the "public domain," the court never considered whether the underlying disclosure of allegations *to* the government could have been the public disclosure. 960 F.2d at 322. Thus, courts have simply assumed that "public disclosure" in this context means "government disclosure," and they have overlooked the plain language of the text.

It is not apparent that Congress believed FCA enforcement would be enhanced merely by the government informing one or more members of the public about its efforts. Congress was chiefly concerned that the government take action, not necessarily disseminate information to the public about its action. A ruling which bars *qui tam* actions (other than by original sources) when allegations are disclosed *to* the government which actually result in the government commencing an audit or investigation, would be consistent with the language and

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24/ *See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991).



purpose of § 3730(e)(4)(A), and would provide a necessary bright line for determining when a *qui tam* action may be brought. The FCA, with its potential for treble damages and penalties (§ 3729(a)), justifies the application of bright line rules.

## CONCLUSION

For the foregoing reasons, Lockheed Martin urges the Court to reverse the Ninth Circuit on the questions presented by the Petitioner.

Respectfully submitted,

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November 29, 1996

# APPENDICES

**APPENDIX A**

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
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| UNITED STATES OF AMERICA, ex rel. MARGARET A. NEWSHAM and MARTIN OVERBEEKBLOEM,<br><br>Plaintiff<br><br>v.<br><br>LOCKHEED MISSILES AND SPACE COMPANY, INC.<br><br>Defendant. | Civil Act. No. C88-20009 RPA<br><br>**MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE** |

## I. INTRODUCTION

This action was brought against Lockheed Missiles and Space Co., Inc. on January 22, 1988, on behalf of the United States of America by two private citizens under the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) et seq.[1/] The private citizens, known as relators, complain of fraudulent conduct they witnessed or learned about while they were employed by Lockheed. One of the relators, Margaret Newsham, makes various allegations of labor mischarging connected with one or two specific government contracts, which will be identified herein as P285 and P377.

Pursuant to 31 U.S.C. §3730(b)(4)(B), on February 3, 1989, the United States notified the court of its election to decline to intervene in this matter, leaving the prosecution of this case to the relators.

Defendant Lockheed has filed a motion to dismiss that portion of the complaint applying to Mrs. Newsham's allegations, on the ground that the court lacks jurisdiction over the subject matter of the action. Lockheed contends that the court's jurisdiction in this case should be governed by the law in existence at the time Mrs. Newsham first informed the Government of her allegations. At that time the False Claims Act contained a jurisdictional bar to actions brought by relators where it was made to appear that the action was based on information and evidence known to the Government at the time the complaint was filed.

On the other hand, Mrs. Newsham argues that her standing or capacity to bring a qui tam action in 1988 should be governed by amendments to the False Claims

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1/ "Qui tam" is from the Latin phrase, "Qui tam pro domino rege quam pro sic ipso in hoc parte sequitur" -- "Who as well for the King as for himself sues in this matter."



Act in 1986, by which Congress eliminated the jurisdictional bar under prior law, and allowed "honest informers" with direct knowledge of the fraud, who first reported the information to the Government, to bring suit, notwithstanding the Government's knowledge.

The United States has an obvious interest in the proper interpretation of the False Claims Act. Many False Claims Act suits are initiated by the Attorney General. Still others, although initially filed by relators under the Act's qui tam provisions, are taken over by the Attorney General. Even where the Attorney General does not take over a qui tam case, the United States is still the principal statutory beneficiary. Because resolution of the issue presented to this Court relates to the proper interpretation of the False Claims Act and could effect the interests of the Government, the United States files this amicus brief.

As demonstrated below, the relator's capacity or standing to bring this action should be governed by the law in existence at the time the suit was filed. By the 1986 amendments to the False Claims Act, Congress specifically intended to allow relators such as Mrs. Newsham to bring suit and not be barred by the prior law's jurisdictional bar. Those amendments generally apply to suits pending in Court after the date of the amendments. Application of the 1986 amendments to this action is not manifestly unjust. The prior jurisdictional bar was never a bar to liability of the defendant; it was only a device to protect the Government from "parasitical suits" brought by know-nothing informers. The Government could still have brought an action based on the relator's information. Congress's decision in 1986, about who should be allowed to prosecute the Government's fraud claims, after the Government has an opportunity to investigate and consider the matter on its own, does not infringe on any matured or unconditional right Lockheed possesses.

## II. FACTS

In the complaint Mrs. Newsham alleges:

1. Employees awaiting security clearances to work on project P285 and other projects were placed in separate areas known as "ice boxes." Mrs. Newsham alleges that ice box employees were under utilized, were given little or no work to perform and constantly were idle or engaged in personal business, but were instructed by their supervisors to charge time to government projects for a full work week.

2. Both ice box employees and regular Lockheed employees with security clearances engaged in personal activities during working hours, while charging their time to government projects. One result of this activity was to increase overtime charges by the regular Lockheed employees.

3. Lockheed awarded numerous sole source subcontracts to Intercon Systems Corporation for employees holding United States Government top secret security clearances without adequate justification and at unreasonable cost to the Government. She alleges that this special treatment was the result of a personal relationship between Lockheed's P285 manager and Intercon's director of personnel.

4. Labor hours were charged to P285 for time spent transferring computer documentation onto P285 computers from a different type computer system for a different government project.

5. On instructions from their supervisors, Lockheed employees shifted their labor hours from P285 to P377 because P285 had exhausted or nearly exhausted its budget.

It is undisputed that in August, 1984 Mrs. Newsham informed the Government, through the Defense Contact Audit Agency (DCAA) Hotline of the same allegations that she ultimately pleaded in her complaint. DCAA conducted separate audits of each of her allegations, except that



involving the mischarging between P285 and P377. DCAA's audit reports were reviewed by the appropriate government contracting officers, who discussed the findings with Lockheed. In the end, the contracting officers determined that no claim against Lockheed was appropriate on any of the audit reports.

## III. ARGUMENT

### 1. The Law At The Time Mrs. Newsham Informed The Government

At the time Mrs. Newsham made her hotline complaint to the DCAA in 1984, the False Claims Act, 31 U.S.C. § 3730(b)(4) provided[2/]:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

The language of the statute in force at the time made it clear that a court had no jurisdiction over an action brought by a relator at any time it was made to appear that the suit

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2/ In 1982, title 31 of the United States Code, including the provisions of the False Claims Act, was enacted into positive law. The False Claims Act, which was formerly found at 31 U.S.C. 231-235, was re-codified at 31 U.S.C. 3729-3731. Although some sections of the Act were shifted from their prior positions, and simple language was substituted for awkward and obsolete terms, Congress intended that the re-codification make no substantive change in the law. See, H.R. Rep. No. 97-651, 97th Cong., 2nd Sess. 3, reprinted in 1982 U.S. Code Cong & Ad News 1897.

was brought based on evidence or information known to the Government on the date the relator brought her action.3/

While the jurisdictional question turned on whether the suit was based on information in the hands of the Government at the time the suit was brought, the Courts ruled that it was not necessary that the Government's knowledge be the exact equivalent of that provided by the relator. See e.g., United States ex rel. Greenberg v. Burmah Oil Co., 558 F.2d 43 (2d Cir.), cert. denied 434 U.S. 967 (1977). The evidence possessed by the United States did not have to be the "mirror image" of the information in the hands of the relator. United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1377 (D.C. Cir. 1981), cert. denied 455 U.S. 999 (1982); United States ex rel. Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980).

Rather, as stated by the Court in Pettis ex rel. United States v. Morrison-Knudson Co., 577 F.2d 668, (9th Cir. 1978), all that was necessary to invoke the jurisdictional bar was that:

> the evidence and information in possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it to adequately investigate the case and to make a decision whether to prosecute.

577 F.2d at 674.4/

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3/ However, because the Government could cure the jurisdictional defect by taking over the action from the relator within sixty days after the action was filed, the Court's jurisdiction had been referred to as "conditional" in such circumstances. United States ex rel. Sacks v. Philadelphia Health Management Corporation, 519 F. Supp. 818, 822 (E.D. Pa. 1981); United States ex rel. Shinn v. State of Tennessee, 74 F. Supp. 635 (E.D. Tenn. 1947); United States ex rel. Bayarsky v. Brooks, 110 F. Supp. 175 (D.N.J. 1953).



The source of the Government's prior knowledge could range from prior formal State government investigations communicated to Federal officials, as in United States ex rel. Wisconsin v. Dean, supra and United States ex rel. McFarlane v. Hutchinson, 519 F. Supp. 563 (D. Co. 1981), to newspaper articles, as in United States ex rel. Wisconsin v. Dean, supra; United States ex rel. Greenberg v. Burmah Oil Co., supra; and United States ex rel. Thompson v. Hays, supra.

Moreover, recognizing Congress's refusal in 1943 to adopt a specific provision to the contrary, Courts ruled that the jurisdictional bar applied, even if the relator was the original source of the information in the Government's hands at the time the suit was brought. Safir v. Blackwell, supra; Pettis ex rel. United States v. Morrison-Knudson Co., supra; United States ex rel. Aloff v. Aster, 176 F. Supp. 208 (E.D. Pa. 1959), aff'd, 275 F.2d 281 (3rd Cir.),

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*(Footnote cont'd from previous page.)*

4/ See also, United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981); United States ex rel. State of Wisconsin v. Dean, 629 F.2d 1102 (7th Cir. 1980); United States ex rel. Weinberger v. State of Florida, 615 F.2d 1370 (5th Cir. 1980); Safir v. Blackwell, 579 F.2d 742 (2nd Cir. 1978); United States ex rel. Weiss v. Schwartz, 546 F. Supp. 422 (N.D. Cal. 1982); United States ex rel. McFarlane v. Hutchinson, 519 F. Supp. 563 (D. Colo. 1981); United States ex rel. Sacks v. Philadelphia Health Management Corp., supra; United States ex rel. Lapin v. International Business Machines Corp., 490 F. Supp. 244 (D. Hawaii 1980). Cf. United States ex rel. Greenberg v. Burmah Oil Co., Ltd., 558 F.2d 43 (2nd Cir. 1977); United States ex rel. Aloff v. Aster, 275 F.2d 281 (3rd Cir. 1960); United States ex rel. Leslie v. Potomac Electric Power Co., 208 F.2d 39 (D.C. Cir. 1953); United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949); United States ex rel. Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976); United States ex rel. Vance v. Westinghouse, 363 F. Supp. 1038 (W.D. Pa. 1973).

cert. denied 364 U.S. 894 (1960); United States ex rel. McCans v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956), aff'd 254 F.2d 90 (D.C. Cir.), cert. denied, 358 U.S. 834 (1958).

Therefore, there is no question that if this action were governed by the law in existence in 1984, this court would have no jurisdiction over Mrs. Newsham's complaint, and it would have to be dismissed.

### 2. The 1986 Amendments

In 1986, Congress amended the False Claims Act. In relevant part, the Act now provides that any person may bring a qui tam action for violation of the substantive provisions of the False Claims Act. The Act no longer contains a provision barring suit if the material information is known by the Government at the time the suit is brought. Instead, the law now allows a person to bring a qui tam case, even on any information already known to the Government, as long as the Government has not previously filed suit using the same information, or the information has not been publicly disclosed.5/ 31 U.S.C. § 3730(e) now provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

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5/ There has been no contention in this case that the Government's investigation of Mrs. Newsham's hotline complaint was publicly disclosed prior to the date this suit was filed.



> (B) For purpose of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The effect of these amendments to the qui tam provisions was substantially to modify the jurisdictional bar. Thus, pre-existing government knowledge of the allegations contained in a complaint is no longer a bar to an action by the relator. Nonetheless, Congress still determined to preserve the prohibition against parasitical lawsuits. Therefore, a relator is barred from proceeding if there has been a prior public disclosure of the allegations, unless the relator can establish that she is an original source. These provisions have the effect of allowing someone like Mrs. Newsham, who was barred under the old Act because she reported the allegations to the Government, to proceed with the action under the new Act.

### 3. The New Law Is Presumed To Apply Immediately

The Supreme Court has stated that, as a general principle, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board City of Richmond, supra at 711.6/ See Thorpe v.

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6/ See also Eikenberry v. Callahan, 653 F.2d 632, 633 (D.C. Cir. 1981) (amendment to 28 U.S.C. § 1331 eliminating the $10,000 jurisdictional amount in Federal Question cases held to retroactively apply to pending cases):

*(Footnote cont'd on next page)*

Housing Authority of Durham, 393 U.S. 268 (1969); see also United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Campbell v. United States, 809 F.2d 563 (9th Cir. 1987); In Re Reynolds, 726 F.2d 1240 (9th Cir. 1984). The Bradley principle means that:

> . . . it is unnecessary to find affirmative support in a statute or its legislative history for applying it to pending cases. A statute will be presumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply.

United States v. Marengo County Comm'n, 731 F.2d 1546, 1553 (11th Cir. 1984).

Several district courts have applied the Bradley presumption of immediate application to the 1986 False Claims Act Amendments. United States v. Board of Education of City of Union City, 697 F. Supp. 167, 171 (D.N.J. 1988); United States v. Hill, 676 F. Supp. 1158, 1166 (N.D. Fla. 1987); United States v. Ettrick Wood Products, 683 F. Supp. 1262, 1265 (W.D. Wis. 1988); United States v. Fischbach & Moore, Inc., Cir. No. 1-87-293 (E.D. Tenn. April 27, 1988) and United

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In the absence of an express congressional statement on the applicability of legislation to pending cases, retroactivity is the rule. As the Supreme Court stated in Bradley, "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." It must be emphasized that it is for Congress to specifically provide for nonretroactivity if that is its intent.

(footnote and citation omitted).



States v. Oakwood Downriver Medical Center, 687 F. Supp. 302, 306-307 (E.D. Mich. 1988).

Since Congress did not specifically provide for prospective applicability in the 1986 Amendments, the applicable presumption is that the Amendments are to be applied to all cases pending on the date of enactment and to all subsequently filed cases, regardless of whether those cases involve pre-amendment conduct. Union City, supra, at 171-172, Hill, supra at 1165-1172; Oakwood supra at 302-307.7/ Congress surely knows how to restrict application of the laws it enacts when it desires to do so. Eikenberry, 653 F.2d at 633-634 & n.5. Indeed, in marked contrast to the False Claims Act Amendments, two other civil fraud remedies statutes passed by Congress in the same legislative session contain specific provisions prohibiting their application to any pre-enactment conduct:

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7/ Normal canons of statutory construction support immediate application of the Amendments to all pending and subsequently filed cases involving pre-amendment activities. "There is no injustice in allowing declaratory statutes to apply retroactively since they do not change the prior state of law . . . [These statutes] should be applied retroactively without hesitation." 1A C. Sands, Sutherland's Statutory Construction § 26.06 (4th ed. 1985) (emphasis added). Furthermore, "[c]ourts have consistently upheld the retroactive application of 'curative' legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be." Long v. United States Internal Revenue Serv., 742 F.2d 1173, 1183 (9th Cir. 1984). Congress' codifications of judicial decisions into statutory law comporting with Congressional intent thus are presumed to be immediately applicable. Stockdale v. Insurance Cos., 87 U.S. (20 Wall.) 323, 331 (1874); Temple University v. United States, 769 F.2d 126, 134 (3d Cir. 1985), cert. denied 106 S. Ct. 2914 (1986); Silverlight v. Huggins, 488 F.2d 107, 109 (3d Cir. 1973). See also 2 C. Sands, Sutherland Statutory Construction § 41.11, at 290.

A. In the Program Fraud Civil Remedies Act of 1986 Pub. L. 99-509, tit. VI(B), § 6101, 100 Stat. 1984 (Oct. 21, 1986)), Congress provided that the Act "was to apply to any claim made, presented, or submitted after the statute's effective date." Id. § 6104.

B. In the Anti-Kickback Enforcement Act of 1986, Pub. L. 99-632, 100 Stat. 3523 (Nov. 7, 1986), Congress provided that the Act shall apply to prohibited conduct that took place after the date of enactment. Id. § 3.

Similarly, in the previous session of Congress, amendments to the False Claims Act relating solely to Department of Defense contracts were specifically made applicable only to claims submitted after the date of enactment. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985).

The absence of any similar language in the False Claims Act Amendments of 1986 indicates that Congress intended the Amendments to apply to virtually all pending litigation.[8/] See also Hastings v. Earth Satellite Corp., 628

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8/ Contemporaneous legislative history shows that the drafters of the False Claims Amendments Act were fully aware of the provisions of the other statutes considered at the same time. When first considered by the House Judiciary Committee, the False Claims Act and the Program Fraud Act were both part of the same bill, H.R. 4827. Further, the report of the Senate Judiciary Committee on the Amendments to the False Claims Act states that "language was added to further define the constructive knowledge definition so that it paralleled that found in S. 1134, the Program Fraud and Civil Remedies Act as reported favorably from the Governmental Affairs Committee.... [T]he Committee thought it unwise to allow the possibility of confusion and the lack of a uniformly applied standard in administrative and judicial false claims actions." S. Rep. No. 345, 99th Cong., 2d Sess. 17 (1986); see also id. at 20-21. The same Committee report comments that it adopted the treble damages provisions "to

*(Footnote cont'd on next page)*



F.2d at 85 at 92-93 (D.C. Cir.), cert. denied 449 U.S. 905 (1980) (where prior amendments to D.C. Workmen's Compensation Act specifically prohibited application to pre-amendment conduct, the absence of any similar prohibition in the 1972 amendments shows that Congress intended that those amendments be applied to all pending and subsequently filed cases).

**4. Immediate Application Of The Amendments Will Not Result In Manifest Injustice**

The 1986 Amendments introduced no "substantive" changes -- i.e., creation of new liabilities -- into the False Claims Act. The Amendments clarify Congressional intent, resolve conflicts among the circuits, and provide for a more effective remedy without changing underlying liability. Under the Supreme Court's decision in Bradley, the Amendments are to be applied to all pending and future cases "unless doing so would result in manifest injustice." 416 U.S. at 711. As more fully discussed below, the Amendments are curative and remedial in nature. Therefore, it cannot be said that their immediate application would result in any "manifest injustice." Indeed, "[a]pplication of the 1986 amendments to all pending cases would further the remedial purpose" of the Amendments. Hill, supra at 1168.

In passing the new qui tam provision, Congress sought to encourage the filing of new lawsuits based on preexisting liabilities. Congress's goal in amending the qui tam provisions was to provide more effective means for recovering monies taken from the Treasury by fraud, and that goal will be effectuated by application of the

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comport with legislation passed earlier in the 99th Congress (Pub. L. 99-145, Department of Defense Authorization Act, 1986)." Id. at 17.

amendments to qui tam cases filed after enactment of the amendments. The clear intent of the legislation was curative, remedial and procedural, and such changes in the law are entitled under Bradley to immediate application.

Defendant argues that they are entitled to rely on the "government knowledge" jurisdictional bar of 31 U.S.C. § 3730(b)(4) as an affirmative defense and, therefore, the qui tam Amendment provision should not be retroactively applied to preamendment conduct.9/ Defendant cites as authority for this proposition the District Court decision in United States ex rel. Henry Boisvert v. FMC Corp., No. C-86-20613-WAI (N.D. Cal. Sept. 9, 1987), which was expressly adopted in United States ex rel. Hyatt v. Northrop Corp., Case No. CV 86-6457 (C.D. Cal. March 31, 1988).

Such reliance is misplaced since both cases cited by the defendant are inapposite to the case now before the court. Both cases involved suits filed under the qui tam provisions in effect before Congress amended the Act: the question before those courts was whether the old law or new law applied in determining the standing or capacity of the relator to sue in an action which was filed before the new law had been passed.

The FMC decision reached the correct result on the facts of that case – – the prior False Claims Act qui tam provisions were applicable to a suit filed prior to the 1986

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9/ A defense based on the jurisdictional bar under prior law is not an "affirmative defense" in the traditional sense. The affirmative defenses listed in Rule 8(c) of the Federal Rules of Civil Procedure deal mainly with the avoidance of underlying liability, and lead to dismissal of the case on the merits. Rather, Lockheed's arguments in this case really go to the issue of the relator's capacity or standing to sue, a defense having nothing to do with underlying liability, and which is dealt with separately under Rule 9(a) of the F.R.C.P.



amendments to the Act.10/ However, the FMC conclusion that the new qui tam provisions affect "vested" or "antecedent" rights of defendants (and by implication, cannot be applied to cases filed after the date of enactment involving acts that occurred prior to the date of the amendments) conflicts both with Congressional intent and with applicable law, and should be rejected by this court.

The jurisdictional bar under prior law depriving a relator of standing if the Government was in possession of the information forming the basis for the relator's action, was a provision created entirely for the benefit of the Government; the fact that a defendant could move to dismiss a relator's case for lack of standing on this basis is incidental and did not create any "vested right" in defendants to such a defense.11/

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10/ The United States submitted an amicus curiae memorandum in both cases in support of the proposition that the facts relating to a citizen's standing as a proper relator should be fixed as of the date he brings his suit. The need for this narrow exception to the Bradley presumption is attributable to the unique nature of the qui tam provisions – in many, and perhaps most qui tam cases, it would be impossible to apply the qui tam provisions of the new amendments (eg. the sealing provisions) to cases filed prior to the date of the amendments. Likewise, to the extent that Congress amended the qui tam provisions to encourage the filing of qui tam suits by relators, that Congressional purpose is not served with respect to suits already filed by the relators prior to the amendment.

11/ The statute specifically gave the district courts the responsibility, sua sponte, to dismiss any action brought based upon knowledge in the government's possession, 31 U.S.C. § 3730(b)(3), and did not convey any right to dismissal to a defendant. Further, governmental knowledge of the facts underlying a pre-amendment qui tam suit did not relieve the defendant of liability in the event that the United States either proceeded with the action or subsequently instituted a new action based on the same allegations.

Further, potential False Claims Act defendants, like Lockheed, have no vested right or expectation to any particular plaintiff or in any other change in law that affects only "the form of the action to be commenced." Terry v. Anderson, 95 U.S. 628, 633 (1877). As the Supreme Court has made clear, "as to the forms of action or modes of remedy it is well settled that the legislature may change them at its discretion." Id. See Meller v. Heil, 745 F.2d at 1305 (  ) ("a defendant does not have a vested right in application of a given remedial scheme"); see also Crane v. Hahlo, 258 U.S. 142 (1922) (transfer of eminent domain proceedings from court to administrative body did not impair vested rights).

Moreover, even if defendants could show a "vested right," which they cannot, the immediate application of the qui tam provision to this case, based on the defendants' pre-amendment conduct, works no "manifest injustice." In order for Lockheed's arguments to succeed, they must show that they actually relied upon some vested right in order for it be unjust for the right to be denied them now. Clearly, they cannot argue that they relied upon the former qui tam provision in this matter. See e.g., Hill, supra, at 1169.

Furthermore, Lockheed's arguments that the time of filing suit is not relevant to the court's determination are without merit. Both the prior law and the 1986 amendments refer to the time the complaint is filed in determining the capacity of a relator to bring an action. In similar circumstances, in cases in which a court must decide if it possesses diversity jurisdiction, the court's determination is restricted to the facts that existed on the date the complaint was filed. Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957); Topp v. Compair Inc., 814 F.2d 830, 832 (1st Cir. 1987); Hawes v. Clum Ecuestre El Comandante, 598 F.2d 698 (1st Cir. 1979); Lugo-Vina v. Pueblo International, Inc., 574 F.2d 41, 42 n.1 (1st Cir. 1978). See also Wright, Federal Courts, § 28 at 107 (3rd Edition 1976).



## IV. CONCLUSION

Therefore, for the above reasons, the United States respectfully submits that the False Claims Act Amendments of 1986, particularly those removing the jurisdictional bar against those who had previously informed the Government of fraud by a potentially culpable defendant, should be held applicable to all cases filed after their enactment, and that, as a result, the court should deny defendant's motion to dismiss.

s/Vincent B. Terlep
VINCENT B. TERLEP, JR.
Attorney for the United States

Dated: February 15, 1989

## APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel. DON H. HAYCOCK,<br>Plaintiff-Appellant,<br>v.<br>HUGHES AIRCRAFT COMPANY,<br>Defendant-Appellee. | No. 94-55620<br>94-55826<br>D.C. No. CV-90-01977-KN<br>**MEMORANDUM*** |

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge Presiding

Argued and Submitted September 15, 1995
Pasadena, California

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.



After reviewing the record de novo, Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994), we conclude that Haycock presented no evidence of fraud or false statement. We are unable to identify, in the evidence submitted, fraudulent allocations of employees to the direct as opposed to the indirect categories, double billing, or fraudulent accounting practices. Nor can we identify a cost accounting standard which Appellee was required to follow and did not follow. There is no evidence in the record which we have been able to find to show that Appellee improperly classified any indirect costs as direct costs, or overcharged for any of the fringe benefits and other entitlements associated with waiver costs. Whatever may have been arguable was disclosed to and approved by the government, so far as the evidence in the record shows.

Nor is there any evidence in the record to show a false certification under the Truth in Negotiations Act, 10 U.S.C. § 2306a(a), or false statement of cost or pricing data. 10 U.S.C. § 2306a(a)(2).

The district judge had discretion to award attorney's fees if it found that the relator's claim was "clearly frivolous," 31 U.S.C. § 3730(d)(4), and it did. This standard is met if "the plaintiff continued to litigate after" his claim "clearly became" groundless or without foundation. Hughes v. Rowe, 449 U.S. 5, 15 (1980). Our review of the attorneys' fees award is limited by the abuse of discretion standard. In re Washington Public Power Supply System, 19 F.3d 1291, 1296-97 (9th Cir. 1994). The district court was within its discretion in awarding attorneys' fees, as it did, for the period after Hughes served on the relator declarations of the relevant government

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** The Honrable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

officials showing that the cost allocation system was known to, and approved by, the government.

The district court's denial of his motion for reconsideration of the attorneys' fees award is reviewed for abuse of discretion. Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994). The court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped ligating after the disclosures which showed absence of fraud or false statement.

Appellee's request for attorneys' fees on appeal is denied. See Fed. R. App. P. 38; Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991) (attorneys fees' not awarded where appeal not "clearly meritless").

AFFIRMED.



Tue Oct 15, 1996 8:38 am mailbox
memclerk/mail/standard Page 1

| DATE | FROM | SUBJECT CODES |
|---|---|---|
| 10/11/96 | Judge Kleinfeld | Haycock v.Hughes 94-55620 |

Intended:
Sent: 10/11/96 at 5:16 p.m.
Delivered: 10/11/96 at 5:12 pm
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CC: Judge T. Nelson, Judge Wilken via Fax, ARMS, Opinions Clerk
Ref: 961011171632-0700
From: Judge Kleinfeld Auth by:
Subject: Haycock v. Hughes 94-55620
Test [09/15/95 - Pasadena] 94-55826
[ajk/docs/septemb95/hay.md.fil]

I certify that all judges concerned concur in the attached 3-page memorandum disposition. Please file it simultaneously with the opinion just previously sent for filing. Thank you.

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APPENDIX C

# THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE PROGRAM

## A DESCRIPTION OF THE PROCESS

**INSPECTOR GENERAL**
**DEPARTMENT OF DEFENSE**



**INSPECTOR GENERAL**
**DEPARTMENT OF DEFENSE**
**400 ARMY NAVY DRIVE**
**ARLINGTON, VIRGINIA 22202-2884**

## FOREWARD

The Voluntary Disclosure Program is considered by the Department of Defense to be a cornerstone of self-governance by Defense contractors and a manifestation of cooperative relations between Government and industry. The commitment to the Voluntary Disclosure Program by Defense management remains strong. This is evidenced by the recent Defense Management Report to the President which emphasized the continued need for voluntary disclosure.

The Voluntary Disclosure Program is not an amnesty or immunity program, but rather a means by which Defense contractors can bring to light potential civil or criminal fraud matters. Those matters of a purely administrative nature, of course, shall not be included in the Program. In return for disclosing potential fraud and cooperating in any Government audit and investigation of the matter, the Government generally allows the contractor the opportunity to conduct an internal investigation which the Government then attempts to verify in an expedited manner. The Department of Defense further agrees generally not to initiate administrative actions until its verification process is completed.

Coordination of information is essential to the effective and expeditious resolution of the matter. By keeping all responsible Government parties informed of the status of the matter, problems identified may be more quickly resolved. Government representatives are then better

equipped to determine what, if any, criminal, civil, and administrative remedies are appropriate.

The pamphlet "The Department of Defense Voluntary Disclosure Program – A Description of the Process" describes general guidelines, policy, and processes used by Department of Defense and Department of Justice personnel who share the responsibility in the resolution of fraud matters. The process described in the pamphlet is intended to allow for flexibility, when needed, in the audit, investigations, and verification of matters brought into the Voluntary Disclosure Program.

Susan J. Crawford
Inspector General



# THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE

## A DESCRIPTION OF THE PROCESS

The purpose of this pamphlet is solely to describe the process used by the Department of Defense and the Department of Justice in the Administration of the Department of Defense Voluntary Disclosure Program. The pamphlet does not, nor should be relied on, to create, confer, or grant any rights, benefits, privileges, or protections enforceable at law or in equity by any person, business, or entity in either civil, criminal, administrative, or other matters. This pamphlet does not in any way limit the lawful litigative prerogatives of the Department of Defense and Department of Justice.

**INSPECTOR GENERAL**
**DEPARTMENT OF DEFENSE**

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## TABLE OF APPENDICES
## [APPENDICES ARE NOT REPRODUCED]





### A. PURPOSE

1. The Department of Defense (DoD) encourages Defense contractors to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters affecting their corporate contractual relationships with the DoD as a central part of their corporate self-governance and to enhance contractor responsibility under the Federal Acquisition Regulations. The policy is described in letters from the Deputy Secretary of Defense to Defense contractors, dated July 24, 1986, and August 10, 1987 (Appendix A). The Assistant Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO), Office of the Inspector General, DoD, is the designated point of contact for voluntary disclosures of potential criminal or civil fraud issues. Matters not involving fraud should be presented to the appropriate contracting officer or Defense Contract Audit Agency (DCAA) auditor.

2. The disclosures are made with no advance agreement regarding possible DoD resolution of the matter and with no promises regarding potential civil or criminal actions by the Department of Justice (DOJ). Prompt voluntary disclosure, full cooperation, complete access to necessary records, restitution, and adequate corrective actions are key indicators of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability.

3. The DoD Voluntary Disclosure Program is intended to afford contractors the means to report self-policing activities. It provides a framework for Government verification of the matters voluntarily disclosed and an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation.

4. This pamphlet identifies the participating DoD and DOJ organizations and describes the process by which voluntary disclosures are reported, verified, and acted on.

The complete process for managing voluntary disclosures is depicted in a flowchart (Appendix B).

## B. ORGANIZATIONAL FUNCTIONS

The organizations listed below have the following functions under the DoD Voluntary Disclosure Program:

### 1. Office of Assistant Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO)

The AIG-CIPO receives the initial disclosure, makes a preliminary determination as to whether the disclosure satisfies the requirements of the DoD Voluntary Disclosure Program, coordinates the execution of the standard Voluntary Disclosure Agreement, assigns the matter to a Defense criminal investigative organization (DCIO) for verification, assigns the matter to a suspension and debarment authority, and coordinates the matter with the DOJ for potential civil and criminal action. The AIG-CIPO also serves as the focal point for the dissemination of general information concerning the Voluntary Disclosure Program, is responsible for administering the Program, and coordinates administrative action within the DoD.

### 2. Defense Criminal Investigative Organizations (DCIOs)

The U.S. Army Criminal Investigation Command (USACIDC), the Naval Investigative Service (NIS), the Air Force Office of Special Investigations (AFOSI), and the Defense Criminal Investigative Service (DCIS) are the Defense criminal investigative organizations (DCIOs) that conduct investigations under the Program. One DCIO will serve as the lead investigative agency. Following admission into the DoD Voluntary Disclosure Program, the lead DCIO in coordination with other DCIOs when appropriate, conducts an investigation to verify the accuracy and completeness of the matter(s) disclosed. The lead DCIO, may request the Defense Contract Audit



Agency (DCAA) to conduct a verification audit that will generally be based on the contractor's internal report of investigation. The lead DCIO coordinates its activities with the AIG-CIPO, the DOJ, the DCAA, and the cognizant suspension and debarment authority.

### 3. Defense Contract Audit Agency

The DCAA will, in most instances, be requested by the lead DCIO to conduct a verification audit of the matter(s) disclosed. The audit normally begins following receipt of the contractor's internal report of investigation and focuses on those matter(s) disclosed in the internal report of investigation not covered by a previous audit.

### 4. DoD Suspension and Debarment Authorities

A Military Department or Defense Agency has lead agency responsibility for any suspension or debarment determination resulting from the matter(s) disclosed. The decision whether or not to initiate suspension or debarment action takes into consideration, among other things, the Government verification of the contractor's disclosure, the contractor's cooperation, the adequacy of corrective action, and restitution.

### 5. The Department of Justice

a. The Department of Justice Guidelines regarding the Voluntary Disclosure Program set forth complete guidance for the Department of Justice on referral, investigation and prosecution of voluntary disclosure matters.

b. The Defense Procurement Fraud Unit (Unit) in the Fraud Section, Criminal Division, DOJ, is the point of contact within the DOJ to oversee voluntary disclosure matters. The Unit reviews all voluntary disclosure matters.

(1) The Unit conducts, or refers to the appropriate U.S. Attorney's Office to conduct, whatever

preliminary inquiry is deemed necessary to determine whether there is specific credible evidence suggesting prosecutable violations of Federal laws. If such evidence exists, the matter will be investigated.

(2) The United States Attorney's Office notifies and obtains the concurrence of the Unit prior to any decision to prosecute or decline prosecution of a volunteer corporation.

c. (1) In deciding whether to prosecute, where the law and evidence is otherwise sufficient to initiate prosecutive action, the prosecutor considers among other factors, the truthfulness, completeness, and timeliness of the disclosure; the quality and quantity of the information provided therein; whether a compliance program, including preventive measures, was in place prior to the illegal activity; the extent of the fraud; the pervasiveness of the fraud; the level of the corporate officials involved in the fraud; the degree, extent, quality, and timeliness of the contractor's cooperation in the verification of the disclosure; and the remedial action taken by the contractor.

(2) The determination of whether to initiate or decline prosecution is the sole responsibility of the Department of Justice in accordance with the recommended criteria set forth in the DOJ Voluntary Disclosure Guidelines.

d. The Civil Division, Department of Justice, is responsible for determining whether to seek civil fraud damages in voluntary disclosure matters.

## C. DESCRIPTION OF PROCESS

### 1. The Initial Disclosure

a. The AIG-CIPO – Defense contractors wishing to make a disclosure as part of the DoD Voluntary Disclosure Program should be directed to the Assistant



Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO), telephone (703) 604-8710.

b. Confirmation Letter – When the initial contact with the AIG-CIPO is made by telephone, the contractor will be asked to send a letter confirming the information presented.

### 2. Case Control Number

Control Number – A control number is assigned to each voluntary disclosure (e.g., CIPO 012). The control number is reflected on all communications between the AIG-CIPO, the Military Departments, the Defense Agencies, and the DOJ. The control number is not intended to replace any internal DCIO or DOJ assigned case identification number.

### 3. Preliminary Acceptance

a. Criteria – A matter will be preliminarily accepted into the DoD Voluntary Disclosure Program if the AIG-CIPO determines that:

(1) the contractor disclosed sufficient information as defined in paragraph C.3.b. below, and

(2) the disclosure was not triggered by the contractor's recognition that the potential criminal or civil fraud matter or the underlying facts were about to be discovered by the Government through audit, investigation, contract administration efforts, or reported to the Government by third parties. One factor in determining whether the requirement has been met is whether the Government had prior knowledge of the matter(s) disclosed.

b. Sufficient Information

(1) Information sufficient for preliminary acceptance into the DoD Voluntary Disclosure Program requires the contractor to disclose, at a minimum, the contractor's name, the corporate division(s) affected, the

location of the affected division(s), the Defense Agency(ies) and Military Department(s) affected if known, and the nature and description of the potential fraud. The contractor should also provide, if known, the DoD component with contract administration responsibility, along with the contract number and type, and the estimated financial impact to the Government. Sufficient information should include the nature, effect, time period, and any proposed remedy for the defect, as well as the identification of all end users if the matter disclosed involves defective products or testing.

(2) Since the DoD recognition of a contractor as a "volunteer" depends on the disclosure not being triggered by the contractor's recognition that the potential civil or criminal fraud matter or the underlying facts were about to be discovered by or disclosed to the Government, the AIG-CIPO must have sufficient information regarding the disclosure to do the following:

(a) Conduct an inquiry to learn if the Government had prior knowledge of the matter disclosed by matching factual information from existing investigations and audits with the new disclosure (see paragraph C.6. below).

(b) Determine whether to delay the audit and investigation until the contractor's report of investigation has been received (see paragraph C.13. below).

(c) Determine whether later identified matters are within the scope of the original disclosure.

c. Date of Preliminary Acceptance – The date on which the contractor discloses sufficient information in accordance with paragraphs C.3.a. and b. above, is the date on which the matter is determined to have been preliminarily accepted into the DoD Voluntary Disclosure Program. When the standard Voluntary Disclosure Agreement (hereafter referred to as the "XYZ Agreement,"



Appendix C) is executed, the date of admission into the DoD Voluntary Disclosure Program relates back to the date of preliminary acceptance.

**4. Failure to Disclose Information**

The AIG-CIPO may refuse to admit a matter into the DoD Voluntary Disclosure Program if the AIG-CIPO determines that the contractor knowingly failed to disclose relevant available information, and such information is obtained through other sources.

**5. Notification Requirements Relating to Defective Products and Testing**

When a disclosure concerns defective products or testing, the lead DCIO promptly notifies the affected Military Department(s) and Defense Agency(ies) of any potential safety or operational hazards. This notification is required by DoD Directive 7050.5, "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities," June 7, 1989.

**6. Inquiry for Prior Government Knowledge**

a. Initiation of Inquiry – Based on the information supplied by the contractor, the AIG-CIPO conducts an inquiry to determine whether the Government had prior knowledge of the matter disclosed. The inquiry is neither binding nor conclusive as to whether the disclosure was triggered by the contractor's recognition that the underlying facts of the potential fraud were about to be discovered by the Government, or as to whether the matter should be admitted into the DoD Voluntary Disclosure Program. Rather, it is one factor considered in making a preliminary determination whether to admit the matter.

b. Inquiry Assignment – Once sufficient information is provided by the contractor, the AIG-CIPO conducts an initial inquiry to determine whether the Government had prior knowledge of the matter disclosed. In most instances, the following inquiries are made:

(1) DCIO Inquiry – A DCIO is requested to conduct a Defense Central Index of Investigations (DCII) check for open cases that could incorporate the matter(s) disclosed. When appropriate, the DCIO may be requested to make further inquiries to DCIO field offices as to the matter(s) disclosed.

(2) DCAA Inquiry – The DCAA representative to the DPFU is asked to determine whether the matter(s) disclosed is:

(a) a matter presently proposed for audit by DCAA where notification has been given to the company;

(b) a matter that is presently or has been the subject of a DCAA audit; or

(c) a matter in which the DCAA has issued an audit report or report of suspected irregularity. The DCAA is also asked to provide information regarding the nature and scope of the audit to determine whether the DCAA audit activities could incorporate the matter(s) disclosed.

(3) Federal Bureau of Investigation (FBI) Inquiry – The FBI representative to the DPFU is requested to determine whether there is an ongoing or previously conducted FBI investigation that could incorporate the matter(s) disclosed.

(4) Defense Procurement Fraud Unit (DPFU) Inquiry – The DPFU is requested to determine whether there are any ongoing or previously conducted criminal investigations or litigation that could incorporate the matter(s) disclosed. If the matter(s) disclosed suggest possible antitrust implications, the DPFU is asked to determine whether there are any ongoing or previously conducted antitrust investigations or litigation that could impact on the disclosure.

(5) Civil Division, DOJ, Inquiry – The Civil Division, DOJ, is requested to determine whether



there are any ongoing or previously conducted civil investigations or litigation, including False Claims Act qui tam suits (31 U.S.C. 3729 et seq.), in which the matter(s) disclosed could be incorporated.

(6) Suspension and Debarment Inquiry – The cognizant suspension and debarment authority is requested to determine whether there are any ongoing or prior suspension and debarment actions that could involve the matter(s) disclosed.

(7) Other Inquiries – When appropriate, other Inspectors General and investigative agencies may be contacted to inform them of matters that may impact on their programs or operations, or determine whether they are aware of any investigations or litigation that may impact on the matter(s) disclosed.

### 7. Notification of Preliminary Acceptance

When a decision is made to preliminarily accept a matter into the DoD Voluntary Disclosure Program, the contractor is advised in writing (Appendix D). The letter explains that the contractor's continued participation in the program is contingent on prompt execution of the standard XYZ Agreement, compliance with the terms of the XYZ Agreement, and compliance with the requirements set forth in the Deputy Secretary of Defense letter of July 24, 1986. The standard XYZ Agreement is enclosed with the letter. Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the assigned DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

### 8. Matters Rejected

The contractor is advised in writing if the matter is rejected from inclusion in the Voluntary Disclosure Program (Appendix E). The letter, however, encourages the contractor to cooperate in the Government audit and investigation. Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

### 9. XYZ Agreement

The standard XYZ Agreement is used in all disclosure matters absent compelling circumstances requiring deviation. The XYZ Agreement should be signed promptly by an authorized director or officer of the contractor, preferably within two weeks of receipt, and returned to the AIG-CIPO. When signed by all required signatories, copies are sent to the DPFU; the Civil Division, DOJ; the assigned DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

### 10. Failure to Sign XYZ Agreement

The AIG-CIPO will attempt to resolve any outstanding issues concerning the XYZ Agreement. In the event the contractor refuses to sign the XYZ Agreement or makes demands that are unacceptable to the Government, the AIG-CIPO will advise the contractor in writing of the removal of the matter from the DoD Voluntary Disclosure Program (Appendix F). Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the DCIO(s); the DCAA; and the suspension and debarment authorities.

### 11. Notification of Admission into the Voluntary Disclosure Program

Following execution of the XYZ Agreement, the AIG-CIPO notifies the contractor in writing confirming the admission of the matter into the DoD Voluntary Disclosure Program (Appendix G). The contractor, if it has not already done so, will be asked to inform the AIG-CIPO within ten days of the execution of the XYZ Agreement whether a written report will be provided describing the results of the contractor's internal investigation. In addition, the contractor is informed that any written report should be submitted within 60 days of the initial disclosure. The AIG-CIPO's confirmation letter will identify the responsible DCIO(s), the cognizant suspension and debarment authority, and the points of contact within each. Copies of the letter are sent to the DPFU; the Civil



Division, DOJ; the responsible DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

### 12. Contractor Internal Report Investigation

a. Internal Investigation – The contractor determines whether an internal investigation will be conducted. While the Government does not require such an investigation, it generally is in the best interest of the contractor to conduct their own investigation and submit a report describing the results.

b. Timely Completion of Report – Contractors choosing to provide CIPO with a written report describing the results of their internal investigation are requested to submit their report within 60 days of the initial disclosure. If the contractor is unable to complete the report within 60 days, the contractor should request an extension of time. The AIG-CIPO will determine if and on what basis an interim report(s) should be provided.

c. Distribution of Report – The AIG-CIPO sends to the contractor a letter confirming receipt of the contractor's internal report of investigation (Appendix H), and distributes copies (with restrictive markings to protect proprietary/sensitive contents) to the assigned DCIO(s); the DPFU; the Civil Division, DOJ; the DCAA (if the disclosure relates to contract fraud); and the assigned suspension and debarment authority. When appropriate, the DPFU distributes a copy to a U.S. Attorney for prosecutive review. The Civil Division, DOJ, forwards a copy to any U.S. Attorney involved in related civil litigation.

### 13. Government Actions Pending Contractor Internal Investigation

a. Timing of Government Investigation – As a general rule, the Government does not begin the verification process or conduct its own audit or investigation until it has received the contractor's internal report of investigation. The Government, however,

reserves the right to begin its own audit or investigation at any time. Under certain circumstances, the contractor may be asked to discontinue or limit its internal investigation.

b. Statute of Limitations – During completion of the contractor's internal investigation, if the Government determines that the criminal or civil statute of limitations will expire as to the matter disclosed, or any part thereof, within one year after submission of the contractor's report, the Government, at its option, may request the contractor to waive the statute of limitations for a period it deems appropriate. Refusal to waive the statute of limitations will be considered in evaluating the cooperation of the contractor.

## 14. Verification

a. Investigative Plan – Following receipt of the contractor's internal report, the designated DCIO(s) begins the verification process. The verification audit and investigation are given sufficiently high priority to allow for its expedited completion. The DCIO prepares a written investigative plan and coordinates it with the criminal prosecutor assigned to the matter, and the Civil Division, DOJ. The plan focuses the investigation, serves as a roadmap for the DCIO(s), and provide a means for the DCIO(s) to track the progress and ensure timely completion of the verification process.

b. DCAA Verification Audit – The DCIO(s), in most instances, request the DCAA to conduct a verification audit. The DCAA auditor assigned to the matter is briefed on the investigative plan to ensure a coordinated effort. If sufficient information is available and the circumstances warrant, the DCIO(s) may begin its own investigation prior to completion or in conjunction with the audit.

c. Scope of Verification Audit and Investigation – The scope of the verification audit and investigation focus specifically on the matters disclosed by the contractor, and include the quantification of the Government losses and potential civil forfeitures under the



False Claims Act. Unrelated fraud allegations developed during the verification process are pursued by the initiation of an independent audit or investigation in accordance with normal procedures unless their relationship to the matter disclosed is so commingled as to prevent their severance. Such allegations are not treated as part of the Voluntary Disclosure Program without prior coordination with the AIG-CIPO.

## 15. Contractor's Cooperation During the Verification

The contractor's cooperation is essential to the verification audit and investigation. Problems regarding the contractor's cooperation that cannot be readily resolved by the DCIO field agent and the DCAA auditor (e.g., refusal to supply records or allow interviews), are promptly brought to the attention of the respective headquarters of the DCIO(s) and the DCAA for resolution. Where the contractor's cooperation is unsatisfactory, the headquarters of the DCIO and/or the DCAA promptly notify the AIG-CIPO in an attempt to resolve the issue. The AGI-CIPO will, in turn, notify the DPFU of the unsatisfactory cooperation. When appropriate, the AIG-CIPO, with the assistance of the Office of the General Counsel, DoD, will attempt to resolve the problem with counsel representing the contractor.

## 16. Use of Subpoenas

The DoD Voluntary Disclosure Program assumes contractor cooperation. Should subpoenas for documents be necessary, it is standard procedure to use Inspector General subpoenas rather than grand jury subpoenas. Prior to the issuance of a grand jury subpoena in a voluntary disclosure matter, the assigned DCIO agent promptly notifies the DCIO headquarters, which in turn, notifies the AIG-CIPO.

**17. Defense Criminal Investigative Organizations (DCIOs) Case Management and Progress Reports**

a. Progress Report – The DCIO headquarters monitor all voluntary disclosure matters assigned to their organization to ensure adequate progress and expeditious completion. The DCIOs forward a progress report for each voluntary disclosure investigation every 90 days to the AIG-CIPO (Appendix I). On receipt of the 90-day progress report, the AIG-CIPO forwards a copy to the DPFU; the Civil Division, DOJ; and the DCAA. The progress reports separately summarize each ongoing investigation, incorporating the following information:

(1) subject(s), including corporate name, affected division(s), and affected location(s);

(2) the investigative organization assigned case number, the CIPO assigned disclosure control number, and the DCIO(s) field office assigned to conduct the investigation;

(3) an initial summary, including allegations, Military Departments and Defense Agencies affected, the time frame in which the allegation occurred, the identification of contracts under investigation, the status of the contracts, and the contractor's estimated cost impact to the Government;

(4) matters involving defective products or testing include a description of the defect, the effect on health or safety, the time period involved, notice to the users, and corrective action taken;

(5) updates include all newly acquired information including prosecutive status (both civil and criminal), new cost impact figures calculated by either the contractor or the DCAA, changes in the scope of the investigation, new allegations raised, or allegations determined to be unfounded;



(6) other significant information to be reported includes declination of prosecution, criminal indictment, use of subpoenas, and any problems arising during the audit and investigation such as poor cooperation or need for subpoenas;

(7) date audit was completed and date the investigation was closed; and

(8) monies offered by the corporation, accepted by the Government, including checks, credits, or other offsets.

b. Progress Report Reviews – Each DCIO schedules a meeting at a location of its choice within 14 days of the progress report to review the status and planned actions of each open investigation. Attendees at the meeting may include a representative from the OAIG-CIPO; the DCIO; Office of General Counsel, DoD; the DPFU; and Civil Division, DOJ.

**18. Payments by Contractors**

a. Required Coordination with the Civil Division, DOJ – Collection of any civil damages for all DoD voluntary disclosure matters is the responsibility of the Civil Division, DOJ. Unsolicited payments, restitution, or any other funds representing the contractor's estimate of the cost impact of the matters disclosed are coordinated with the Civil Division, DOJ, and the DPFU prior to acceptance. While it should be determined if the contractor is willing to make restitution, specific requests for payment are coordinated with the Civil Division, DOJ, and the DPFU. When it is agreed that payment is appropriate, contractors desiring to pay restitution or make good faith reimbursements are instructed to provide a check to the AIG-CIPO made payable to "the Treasurer of the United States."

b. Other Required Coordination – The Civil Division, DOJ consults with the criminal prosecutor assigned to the matter, the AIG-CIPO, and the suspension

and debarment official, and determines whether immediate payment by the contractor would be in the Government's best interests with respect to its potential civil remedies.

c. Requirements Affecting Good Faith Reimbursements – When determined that an unsolicited payment will be accepted or a payment will be solicited and accepted, the acceptance is conditioned on a written agreement with the contractor that provides:

(1) acceptance of the payment does not constitute the Government's agreement as to the contractor's ultimate civil or criminal liability for the matter(s) disclosed, and

(2) acceptance shall not prejudice the Government's right to obtain additional damages, fines, and penalties for the matter(s) disclosed.

**19. Removal of a Matter from the DoD Voluntary Disclosure Program**

a. Reason for Removal – The AIG-CIPO may remove a matter from the DoD Voluntary Disclosure Program at any time during the verification process if:

(1) the disclosure is determined not to meet the Program requirements as set forth in the Deputy Secretary of Defense letter of July 24, 1986, or

(2) the contractor has violated the terms of the signed XYZ Agreement.

b. Notice of Removal – Prior to removing a matter from the Voluntary Disclosure Program, the AIG-CIPO will notify the contractor in writing of the proposed decision to remove the matter, and may provide the contractor an opportunity to respond (Appendix J). A copy of the letter is sent to all DCIOs, suspension and debarment authorities, the DPFU, the Civil Division, DOJ, and the DCAA. The decision to remove is at the sole discretion of the AIG-CIPO.



**20. Case Completion**

a. Records Required – A matter administered under the DoD Voluntary Disclosure Program is closed when the following documents have been provided to the AIG-CIPO.

(1) Notification by the designated DCIO(s) that both the audit and investigation are completed and the matter is closed. The notification identifies the DCAA final dollar impact determination to the Government, the final settlement, and the manner in which the losses were recovered or otherwise resolved.

(2) A letter from the DPFU either confirming the declination of criminal prosecution or indicating the results of any prosecutive actions taken.

(3) A letter from the Civil Division, DOJ, declining civil litigation or indicating the results of civil litigation or settlements.

(4) A letter from the DPFU indicating the results of any prosecutive actions or settlements if the Antitrust Division, DOJ, is involved in the investigation, or a U.S. Attorney has reviewed the matter for potential antitrust violations.

(5) A letter from the designated suspension and debarment authority advising the AIG-CIPO in writing of any action taken or to be taken as to suspension or debarment of the contractor or persons within the contractor's organization.

b. Notification that the Matter is Closed – The AIG-CIPO notifies the DoD contractor in writing that the matter(s) administered under the Voluntary Disclosure Program is closed when the appropriate documents mentioned in paragraph C.20.a.(1) through (5) are received (Appendix K).